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**Airgas USA, LLC and Steven Wayne Rottinghouse, Jr.** Case 09–CA–158662

June 13, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On July 7, 2016, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

I.

The Respondent sells and distributes industrial gases from several facilities, including one in Cincinnati, Ohio (the Cin-Day plant). The Respondent employs commercial drivers who drive trucks with attached trailers to transport cylinders of those gases to and from the Respondent's customers. The drivers generally are responsible for properly securing the cylinders in the trailers so they do not rattle or shift during transport.<sup>3</sup>

Steven Rottinghouse, Jr. was one of the Respondent's commercial drivers. As further described below, the

<sup>1</sup> The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In adopting the judge's determination that the Respondent violated Sec. 8(a)(4) and (1) of the Act when it issued a written warning to employee Steven Rottinghouse, Jr., we find it unnecessary to pass on her analysis of the Respondent's rebuttal burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). We find the judge's animus analysis and her credibility findings clearly establish that the Respondent's reasons for issuing a written warning as opposed to a verbal warning were pretextual. As a result, the Respondent has failed by definition to show that it would have taken the same action absent Rottinghouse's protected conduct. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Where, as here, pretext is found, "there is no need to perform the second part of the *Wright Line* analysis." *Id.*

<sup>3</sup> There are instances in which other employees first secure the cylinders inside a container referred to as a "cradle," which is then loaded onto a driver's trailer. In those instances, the driver is not responsible for securing the cylinders inside the "cradle," but must ensure that the "cradle" is secure.

Respondent issued a written warning to Rottinghouse on August 6, 2015,<sup>4</sup> for driving his truck with improperly secured gas cylinders in his trailer. The General Counsel alleges, however, that the Respondent's real motivation for issuing that discipline was Rottinghouse's past filing of unfair labor practice charges. The judge agreed, and so do we.

II.

In May, just a few months preceding his August 6 discipline, Rottinghouse filed an unfair labor practice charge alleging that the Respondent had threatened to change employees' terms and conditions of employment because Rottinghouse had filed grievances and filed charges with the Board. In July, Rottinghouse filed another charge alleging that the Respondent had given him a 3-day suspension in June in retaliation for engaging in protected union activities and for filing Board charges.

On August 6, while the Region was investigating both of those charges, the Respondent gave Rottinghouse the written warning at issue in this case, based on an incident that had happened on August 3. On August 3, after Rottinghouse had returned to the Respondent's facility after spending the morning collecting gas cylinders, one of the Respondent's operations managers, Clyde Froslear, noticed that the cylinders in Rottinghouse's trailer were tilting and improperly secured. Froslear made no effort to speak with Rottinghouse but, instead, went inside the facility, grabbed his camera, and returned to the truck where he took pictures to document the unsecure load. He made no attempt to inspect the cylinders, secure them, or direct Rottinghouse to do so.

Having seen Froslear taking photos, Rottinghouse returned to his truck to see what Froslear was looking at. The pair made eye contact, but neither said anything, and Froslear returned inside. Froslear then proceeded to watch Rottinghouse from the window of the facility, where he saw Rottinghouse climb onto the back of his truck, secure the leaning cylinders, and drive off. Although Froslear testified that if he saw a "serious safety issue" such as this, he would ensure that it was corrected before the driver left the lot, Froslear made no attempt to speak with Rottinghouse about the safety issue on that day.

The next day, Froslear emailed the Respondent's driver trainer, Mark MacBride, a photograph of the leaning cylinders, asking, "What do you think about this? Look good to you?" MacBride responded, "No. With the cylinders being offset, we would be hit for an insecure load just by how it looks. Where is this truck?" Froslear answered, "Cin-Day." MacBride then asked if the driver

<sup>4</sup> All dates are in 2015 unless indicated otherwise.

caught it before leaving. Rather than answer this question, Froslear wrote “I saw it when he pulled into the yard.” When MacBride again asked if was fixed before leaving, Froslear did not reply that the cylinders had been secured, but instead answered, “This is the way it was when he pulled in after his run.” MacBride emailed, “Unacceptable.” Froslear then wrote, “Where would I find the strongest language about load securement that drivers are trained to?” MacBride told him to look in the driver training manual.

In a disciplinary meeting on August 6, the Respondent gave Rottinghouse a written warning for having improperly secured gas cylinders in his trailer on August 3. During that meeting, and two subsequent grievance meetings in September, Rottinghouse argued that he should only have received a verbal warning. During the last grievance meeting on September 23, a union representative asked that Rottinghouse’s discipline be lowered to a verbal warning because it was Rottinghouse’s first offense. Froslear responded that it was not Rottinghouse’s first offense. Later in the meeting, the representative again asked if Froslear would reduce the written warning to a verbal warning, and Froslear said, “No because it is not Steve’s first DOT violation and because of the severity of the event.”

As stated, the General Counsel alleges, and the judge found, that the Respondent issued Rottinghouse a written warning for the August 3 incident in retaliation for Rottinghouse having filed charges with the Board. For the reasons set forth in the judge’s decision and as further explained below, we also agree, contrary to our dissenting colleague, that the written warning was unlawful.

### III.

The judge found, and it is not disputed, that Rottinghouse’s filing of unfair labor practice charges was protected activity and that the Respondent knew about the filings. Therefore, the judge appropriately focused her analysis on whether the General Counsel showed that the Respondent had animus toward employees filing Board charges.<sup>5</sup> In a detailed decision, the judge found that the evidence as a whole demonstrated that the Respondent was motivated by its disdain for Rottinghouse’s repeated charge filings when it issued him the written warning.

<sup>5</sup> See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011) (“The elements commonly required to support a finding of discriminatory motivation are union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer. Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole”) (citations omitted).

She further found that the reasons the Respondent gave for the discipline were pretextual.<sup>6</sup>

In finding unlawful motivation, the judge first found that the timing of the warning was suspicious. It occurred during an ongoing Board investigation of allegations that Froslear had unlawfully threatened employees with more serious discipline because of Rottinghouse’s unfair labor practice and grievance filings, and not long after Froslear and Cin-Day plant manager David Luehrmann gave affidavits before the Board on July 13.<sup>7</sup> Second, the judge found that Froslear’s actions contradicted his purported concern for safety—the reason he gave for issuing Rottinghouse the warning letter.<sup>8</sup> Third, the judge found evidence of disparate treatment that further demonstrates animus. She explained that at least two other employees received an oral counseling for more serious Department of Transportation violations.<sup>9</sup>

<sup>6</sup> Pretext also supports a finding of animus. See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

<sup>7</sup> We disagree with our dissenting colleague that the judge erroneously relied on timing to support her animus finding. The sequence of relevant events shows that, at the time the Respondent disciplined Rottinghouse, the Region was actively investigating two charges filed by him, only 3 weeks had passed since the Respondent’s managers Froslear and Luehrmann gave affidavits pursuant to the first charge, and only a month had passed since Rottinghouse filed his second charge. See *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 4 (2016) (animus found in Sec. 8(a)(4) allegation based on timing of discipline imposed within weeks of a Board hearing, which took place over 3 months after charge was filed), *enfd.* 713 Fed.Appx. 152 (4th Cir. 2017). See also *Bates Paving and Sealing*, 364 NLRB No. 46, slip op. at 3–4 (2016), and cases cited therein (noting that a discharge occurring 2 months after an employee gave testimony adverse to his employer suggests unlawful motivation and that an employer may wait for a pretextual opportunity to discipline an employee).

<sup>8</sup> If Froslear was concerned about safety after noticing that the cylinders were unsecured, why would he leave the area to obtain a camera rather than seek out Rottinghouse or wait by the truck until Rottinghouse returned? Froslear’s actions suggest that he was instead focused on catching Rottinghouse in an infraction and creating a record against him rather than correcting the problem. And even when Rottinghouse returned to his truck and the two made eye contact, Froslear left without comment and retreated to his office – despite this being the obvious opportunity to identify the problem that needed correction. Contrary to the dissent, it was not “objectively logical” for Froslear to assume that Rottinghouse would observe him taking pictures, notice the deficiency, and correct it without Froslear saying anything, or even waiting until the canisters were secured. It is equally implausible that—were safety Froslear’s true concern—he would have returned inside to “wait and see” whether Rottinghouse would secure the cylinders before continuing his runs. Thus, despite Froslear’s testimony that he would not have allowed a driver to return to the road with a “serious safety issue” without first ensuring that it had been corrected, his actions prove otherwise. Indeed, as the judge found, what Froslear’s actions showed was that “he was out to get Rottinghouse, and therefore more intent on catching and punishing him for reasons other than ensuring public safety . . .”

<sup>9</sup> Our colleague argues that the evidence “falls far short of proving a blatant disparity;” however, “blatant disparity” is not the standard for finding animus from disparate treatment. To be sure, evidence of “bla-

Fourth, the judge rejected the Respondent's claim that the written warning was issued as the next step of progressive discipline.<sup>10</sup> Fifth, the judge found that Froslear's "out to get you" attitude was supported by his email to MacBride seeking the "strongest language,"<sup>11</sup> by

tant disparity" will support a prima facie case of discrimination, but it is not necessary to support such a finding. See, e.g., *Sears, Roebuck & Co.*, 337 NLRB 443, 443-444 (2002) (observing that "blatant disparity" may establish unlawful animus, but instead relying on the record as a whole, including timing, disparate treatment, and other factors, to find such animus); *Aliante Gaming, LLC d/b/a Aliante Casino and Hotel*, 364 NLRB No. 80, slip op. at 1 fn. 3 (2016) (finding that disparate treatment, among other factors, supported a finding of animus).

<sup>10</sup> Froslear's suggestion, echoed by the Respondent, that Rottinghouse's prior offense played a role in the written warning was disingenuous, at best, because the record establishes that it did not. It was not referenced in the warning letter or the first grievance meeting; it was referred to at a later meeting only in response to a question. Further, Froslear's suggestion contradicts his other statements that there was no verbal warning option. We find that these inconsistent and shifting explanations for issuing the written warning support both a finding of animus and that the Respondent was providing pretextual reasons for the written warning. See, e.g., *See Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991), enf'd. mem. 976 F.2d 744 (11th Cir. 1992).

We disagree with our colleague's statement that the judge made a "clear error" in stating that Froslear testified that he issued the written warning as a form of progressive discipline. In response to the question about whether the written warning was issued "because of progressive discipline," Froslear stated, "I mentioned to him that it wasn't his first offense."

<sup>11</sup> We disagree with our colleague's characterization of Froslear's hearing testimony as providing a reasonable explanation for his asking for the "strongest language" about securing cylinders. Rather, we find that testimony—where Froslear tried to paint his inquiry as an effort to better teach drivers—to be disingenuous and are not surprised the judge did not specifically address it as it was clearly "not reliable or trustworthy." Though the Respondent did include in its written warning that "cylinders must be strapped, chained or secured to the vehicle so that they do not rattle," it did not "teach" Rottinghouse how to secure the cylinders. Indeed, Froslear did not even speak to Rottinghouse when they made eye contact when Rottinghouse returned to his truck. Nor did the Respondent require further training from him as it had with another employee who was disciplined for driving with unsecured loads. Thus, we find this testimony to be further evidence of the Respondent's inconsistent and shifting explanations for the written warning, and, therefore, further support for the judge's animus finding. See *Lucky Cab*, supra 360 NLRB at 274.

Additionally, we find that Froslear's evasiveness with MacBride on August 5 supports the judge's finding that Froslear had an "out to get you attitude." In his emails, Froslear did not directly answer MacBride's questions as to whether the tilting cylinders were caught by the driver or fixed before the truck left the plant, even though Rottinghouse had indeed secured the cylinders before leaving. This evasiveness occurred right before Froslear asked for the "strongest language," and it adds further context to the "strongest language" request. We find that the whole interaction with MacBride shows suspect behavior by Froslear, which when combined with the record as a whole, provides a clear picture of Froslear's "out to get you" attitude and strong evidence of the Respondent animus toward Rottinghouse's protected activity of filing charges.

its failure to conduct a meaningful investigation,<sup>12</sup> and by false testimony provided by Froslear regarding the falling cylinder.<sup>13</sup>

The judge also found, with clear record support, that Froslear was not credible regarding his real reasons for issuing Rottinghouse the warning letter. The judge stated, "I find that Froslear's inconsistent and unbelievable testimony about discipline,<sup>14</sup> misrepresentation about falling cylinders, dishonesty about not seeing Rottinghouse outside near the truck,<sup>15</sup> failure to physically examine the cylinders on the truck<sup>16</sup> and failure to find Rottinghouse and correct the unsecured cylinders<sup>17</sup> support my finding . . . that he was not credible regarding his real reasons for issuing Rottinghouse's warning letter and not agreeing to reduce it to a verbal counseling or warning."

For all of those reasons, we agree with the judge that the evidence as a whole shows that the Respondent was not credible in explaining why it gave Rottinghouse a written warning as opposed to an oral warning, and we find that the reasons it did give were a pretextual attempt to mask the Respondent's unlawful motivation, which was based on animus toward Rottinghouse's Board activity. Therefore, as we found above, the Respondent has failed by definition to show that it would have taken the

<sup>12</sup> Froslear made no attempt to physically examine the cylinders in Rottinghouse's truck to determine if they were at risk of moving. Nor did Froslear make any attempt to speak to Rottinghouse about the cause of the issue, his concerns about the unsecured load, or how to fix it, despite having numerous opportunities to do so. Rather, Froslear merely watched through his office window as Rottinghouse corrected the problem. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998) ("The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are clear indicia of discriminatory intent."), enf'd. 201 F.3d 592 (5th Cir. 2000).

<sup>13</sup> Froslear testified that he saw the cylinders falling, and later clarified his testimony to state that they had just tilted, but, in fact, the judge found that Froslear never saw the cylinders move at all.

<sup>14</sup> Froslear falsely stated that he was not familiar with an oral warning given to employee Jeffries for a vehicle backing accident. He also gave "incredulous" testimony where he stated that he did not consider a commercial driver talking on the phone while driving to be a serious Department of Transportation infraction, despite that it could have subjected the driver to a \$2570 fine and the Respondent to an \$11,000 fine.

<sup>15</sup> When asked by the General Counsel if he talked to Rottinghouse after noticing the leaning cylinders, Froslear testified, "I didn't know where Mr. Rottinghouse was at." This, however, was not true. As the judge found, "[Froslear] certainly knew he was somewhere on the premises," and "he knew to watch through a window to see what Rottinghouse would do next."

<sup>16</sup> Froslear testified that he did not have to physically touch the cylinders because he saw them move; however, as the judge found and as noted above, Froslear never saw the cylinders move.

<sup>17</sup> As the judge detailed, and as we noted above, Froslear's actions on August 3 demonstrated a lack of concern for safety.

same action absent Rottinghouse's filing of charges with the Board.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Airgas USA, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 13, 2018

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Mark Gaston Pearce,	Member
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Lauren McFerran,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

The Charging Party in this case, Steven Rottinghouse, Jr., failed to secure gas cylinders on his truck, which was a serious violation of Department of Transportation (DOT) and company safety policies. The Respondent, Airgas USA, LLC, gave Rottinghouse a written warning. Even Rottinghouse admits that discipline was warranted, but he claims that he should have only received a verbal warning. However, the judge found that the Respondent's Operations Manager, Clyde Froslear, had a "complete lack of concern" for safety and was "out to get Rottinghouse," using the cylinder incident as a pretext to discipline him "for reasons other than ensuring public safety or protecting Airgas from liability." My colleagues agree with the judge, and find that the written warning violated Sections 8(a)(4) and (1) of the National Labor Relations Act (the Act), which prohibit retaliation based on the filing of unfair labor practice charges and participation in NLRB proceedings.

I believe my colleagues and the judge are incorrect, and their finding of a violation is unsupported by a preponderance of the record evidence. In my view, the record supports the Respondent's contention that its sole motivation for the warning was Rottinghouse's failure to properly secure the gas cylinders in his truck. The contrary finding by my colleagues and the judge is based on unwarranted inferences and the subjective judgment regarding what they believe the Respondent's safety procedures and disciplinary policy should be. Accordingly, I respectfully dissent.

### Facts

The Respondent sells and distributes industrial gasses from a facility in Cincinnati, Ohio (the "Cin-Day plant"). Operations Manager Froslear oversees several of the Respondent's facilities, including the Cin-Day plant. David Luehrmann is the Cin-Day plant manager. Charging Party Rottinghouse is one of the Respondent's commercial drivers and a member of the Teamsters Ohio Local 100 (the Union) that represents the drivers.

Prior to the discipline at issue in this case, Rottinghouse had filed two unfair labor practice charges with the Board. On May 14, 2015,<sup>1</sup> he filed a charge in Case 09-CA-152301. This charge was ultimately resolved by an informal settlement agreement approved by the Regional Director for Region 9 on September 3.<sup>2</sup> On July 7, Rottinghouse filed a charge in Case 09-CA-155497 alleging that the Respondent retaliated against him for engaging in protected concerted activities and for filing Board charges when it suspended him for 3 days on June 22 for dishonesty and a deliberate violation of DOT policy by completing paperwork off the clock. This was his first discipline while working for the Respondent. The Regional Director dismissed the charge on September 22. The General Counsel's Office of Appeals denied Rottinghouse's appeal of the dismissal on November 5, stating in part that "there was no objective evidence of hostility linking the Employer's decision to your participation in Board proceedings."

The incident giving rise to this case occurred on August 3. Rottinghouse drove his truck that day on a route that included several stops to pick up empty cylinders at a General Electric plant. The credited testimony establishes that Operations Manager Froslear was in the Cin-Day plant parking lot when he observed Rottinghouse's truck return to the plant yard and heard a rattling noise. Froslear inspected the parked truck and subsequently took one or more cell phone pictures of a group of cylinders on a pallet in the back of the truck. Froslear did not get onto the truck bed to physically inspect or touch the cylinders. One picture he took was introduced into the record. It shows a row of three large cylinders with a single smaller cylinder in front. All cylinders are tilted 10 to 15 degrees. Two straps surround the cylinders, the lower of which is apparently loose. Having a load of cylinders stacked in this manner and not properly secured to prevent leaning or coming completely loose undisputedly violates DOT safety regulations and Airgas policy.

<sup>1</sup> All dates hereafter are in 2015, unless otherwise specified.

<sup>2</sup> Allegations of Sec. 8(a)(3) and (4) violations in this charge were previously withdrawn on August 20. The settlement agreement did not contain a nonadmissions clause and required the Respondent to post a remedial notice.

Rottinghouse saw Froslear taking pictures by the truck. Although Rottinghouse credibly testified that the two men saw each other, neither of them spoke.<sup>3</sup> Froslear returned to his office after taking the pictures. Looking out a window, he observed Rottinghouse rearrange and properly secure the cylinders in an upright position before driving out of the yard. Froslear testified that if he saw a “serious safety issue” such as this, he would ensure that it was corrected before the driver left the lot.<sup>4</sup>

On the morning of August 4, Froslear emailed a photo of the cylinders in Rottinghouse’s vehicle to Mark MacBride, the Respondent’s driver trainer, and asked, “What do you think about this? Look good to you?” MacBride replied, “No with the cylinders being offset we would be hit for insecure load just by how it looks.” The two men continued to exchange emails. After Froslear clarified that the condition existed when Rottinghouse pulled into the yard after his run, MacBride stated, “Unacceptable.” Froslear then asked, “Where would I find the strongest language about load securement that drivers are trained to?” MacBride replied, “[i]n the driver training manual.” Rottinghouse was not identified as the driver during this email exchange.

On August 6, Rottinghouse was presented with a written warning for the insecure load photographed by Froslear on August 3. The warning, set forth in full in the judge’s decision, states in relevant part:

On Monday afternoon, 8/3/15, Clyde Froslear was in the parking lot when he heard rattling and saw you pulling into the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise.

<sup>3</sup> As further discussed below, the judge discredited Froslear’s testimony that he saw the cylinders fall or tilt as Rottinghouse drove his truck into the yard and that he did not see Rottinghouse at or near the truck when inspecting and photographing the cylinders. The judge also discredited Rottinghouse’s testimony that a sudden stop as he entered the yard caused the cylinders to shift, and she discredited the testimony of General Counsel’s witnesses that the cylinders were properly secured.

<sup>4</sup> There is some ambiguity in the record as to whether Rottinghouse drove away immediately after properly restacking and securing the cylinders. Robert Oestreicher, his stepfather and coworker, accompanied him that day on the run to and from the General Electric plant. Oestreicher testified that he went into the Cin-Day plant after the truck was parked. According to him, Rottinghouse came in a few minutes later and said that Froslear was taking pictures of the truck. When Oestreicher asked why, Rottinghouse said “there’s some leaning bottles on the truck at that time. And I [Oestreicher] had mentioned that you’ll probably get a write up.” The judge did not address this part of Oestreicher’s testimony.

You have been trained on the proper way to secure cylinders while being transported. According to the Driver Training Manual, “cylinders must be strapped, chained or secured to the vehicle so that they *do not move or rattle*.” (Italics in original.)

Rottinghouse immediately grieved the discipline pursuant to the collective-bargaining agreement between the Respondent and the Union, asserting that only a verbal warning was warranted under the Respondent’s existing disciplinary policy because the rattling noise was caused by a different group of secured cylinders and Rottinghouse had fixed the leaning cylinders before he left the yard. The parties discussed the grievance on August 6 and in meetings on September 2 and 23, during each of which Rottinghouse and his union representatives unsuccessfully sought to persuade Froslear to reduce the written warning to a verbal warning. During the September 23 meeting, union agent Ron Butts stated that “[Rottinghouse] thinks the warning should be reduced to a verbal since this was his first offense.” Froslear noted that it was not his first offense. When Butts again asked if the warning could be reduced to a verbal one, Froslear stated “[n]o because it is not Steve’s first DOT violation and because of the severity of this event.”

Article 22 of the collective-bargaining agreement between the Respondent and the Union specifically mentions only written warnings and suspensions as discipline. The former remain in an employee’s file for 12 months, and can be used as the basis for progressive discipline during that period; the latter remain on file for 18 months, and can be the basis for progressive discipline during that longer period. Although not mentioned in the parties’ contract, the record undisputedly shows that the Respondent had a progressive disciplinary past practice of issuing only verbal warnings for certain minor first-time offenses,<sup>5</sup> followed by written warnings for a sec-

<sup>5</sup> On September 4, 2013, employee Hollander received a verbal warning for the first-time violation of leaving grease on the steering wheel and knob of a forklift. On September 6, 2013, employee Carlo received a verbal warning for the first-time violation of failing to wear the proper gloves when filling high-pressure cylinders. On October 13, 2014, employee Perkins received a verbal warning for the first-time violation of not wearing a seat belt when operating a fork lift to load empty cylinders onto his truck. On March 2 and September 21, 2015, respectively, employees Huff and Kinkade received verbal warnings for separate first-time violations of clocking in a few minutes prior to the end of their mandatory off duty period. On March 18, 2015, employee Oestreicher received a verbal warning for violation of a work rule by talking on his cell phone while operating a tow motor.

All of the above warnings were documented on the Respondent’s standard forms. The record also contains a copy of a handwritten verbal warning on blank paper issued to employee Jeffries on May 10, 2012, for an undescribed preventable vehicle backing accident. Plant

ond infraction of a similar kind.<sup>6</sup> Froslear explained the practice with respect to minor offenses in his April 28 meetings with employees. According to Plant Manager Luehrmann's credited testimony in this proceeding, which was consistent with statements in affidavits given by him and Froslear during the investigation of the charge in Case 09–CA–152301, Froslear used the hypothetical of an employee's failure to wear safety glasses to explain a continuing practice that a manager would first verbally remind the employee to wear them but "[i]f the manager then saw the employee committing the same infraction, the manager would give that employee a written warning."

Neither Article 22 nor the evidence of past practice shows that the Respondent had a progressive disciplinary pattern beginning with a verbal warning for serious offenses. On the contrary, documentary evidence shows that several employees received written warnings for first-time serious offenses.<sup>7</sup> Further, as previously stated, Rottinghouse's first discipline of any kind during his employment was a 3-day suspension for first-time violation of DOT and Airgas policies by his dishonest and deliberate completion of DOT paperwork while not on duty.

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Manager Luehrmann signed the warning. The judge discredited Froslear's testimony that he was not familiar with this warning.

<sup>6</sup> On November 15, 2011, employee Baker received a written warning because he was observed not wearing safety glasses on consecutive days. On September 6, 2013, employee Hollander received a written warning for not wearing a seat belt when operating a fork lift, a day after he was verbally warned for leaving grease on a forklift.

<sup>7</sup> On March 10, 2011, employee Huff received a written warning for first-time violation of DOT and Airgas safety policies by carrying a load with one cylinder loose on the truck bed, one pallet of cylinders unsecured, and another pallet of cylinders improperly secured. On June 6, 2011, employee Bowman received a written warning for first-time violation of Airgas backup safety procedures by backing into a car while making a delivery. On May 17, 2012, employee Baker received a written warning for first-time violation of DOT and Airgas policies by failing to provide a complete and correct trip load verification and hazardous material manifest. On October 8, 2012, Baker received a 3-day suspension for violation of the DOT safety requirement that he have a valid medical certificate in his possession while driving his route. On October 28, 2013, employee Reed received a written warning for first-time DOT safety violation by talking on his cell phone while driving. The written warning was reduced on November 12 to a verbal warning. There is no evidence of the circumstances that resulted in this change in discipline. On January 25, 2016, employee Huff received a written warning for a preventable accident when he hit and damaged the side of a customer's building with his truck.

In one other instance, employee Haynes received a written warning on January 28, 2014, for two episodes of failing to follow proper pre-filling inspection process, resulting in an operational loss of \$2500 in November 2013 and of \$2000 on January 24, 2014. There is no evidence of separate discipline for the earlier episode.

### The Judge's Decision

The judge found that the Respondent acted out of animus against Rottinghouse for filing charges and participating in the Board's investigation of them, and that Froslear seized upon the cylinder safety issue as a pretext for issuing a written warning. She relied on inferences drawn from circumstantial evidence to find both animus and pretext. Specifically: (1) she found the timing of the warning, issued a month after Rottinghouse filed the charge in Case 09–CA–155497, and about 3 weeks after Froslear and Luehrmann gave Board affidavits relevant to the prior charge filed in Case 09–CA–152301, to be "suspicious"; (2) she found that Froslear's actions on August 3 demonstrated "a complete lack of concern for safety," and that language in his August 4 email exchange with MacBride further demonstrated his "out to get you" attitude; (3) she found that Froslear's written warning represented disparate treatment and a departure from the Respondent's disciplinary policy because two other employees (Reed and Jeffries) received only verbal warnings for what she deemed to be more serious offenses; and (4) she found that Froslear offered shifting and inconsistent rationales for the written warning.

Having found that the Respondent's reasons for issuing the written warning were pretextual, the judge summarily concluded that the Respondent necessarily failed to show it would have imposed the same discipline in the absence of Rottinghouse's protected activity.

### Discussion

The *Wright Line* motivational test for discriminatory discharge and discipline allegations requires that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).<sup>8</sup> A critical element of this initial showing is proof of animus against the protected activity at issue.<sup>9</sup> *Id.* Under certain circumstances, in the ab-

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<sup>8</sup> The Board has held that the *Wright Line* motivational test, originally stated for analysis of allegations of Sec. 8(a)(1) and (3) discrimination, also applies to allegations of Sec. 8(a)(4) discrimination. See, e.g., *Parker Laboratories, Inc.*, 267 NLRB 1174 (1983), *Book Covers, Inc.*, 276 NLRB 1488, 1491 (1985), and *Great Western Produce*, 299 NLRB 1004, 1005 *fn.* 8 (1990).

<sup>9</sup> The *Wright Line* test also requires that the General Counsel make an initial showing that an employer has knowledge of the alleged discriminatee's protected conduct. It is undisputed that the Respondent's officials knew that Rottinghouse filed separate charges in Cases 09–CA–152301 and 09–CA–155497. The judge inferred from the fact that Froslear and Luehrmann gave Board affidavits in the former case, and from the absence of evidence that Respondent's officials did not partic-

sence of direct evidence, proof of animus may be inferred from circumstantial evidence based on the record as a whole. E.g., *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), *enfd.* 976 F.2d 744 (11th Cir. 1992). However, I believe the judge erred in finding that the circumstantial evidence in this case warrants an inference that animus against Rottinghouse's protected Board-related activity motivated Froslear to issue him a written warning.<sup>10</sup>

It is important to recognize what is undisputed here:

- Rottinghouse failed to properly secure the group of 4 cylinders and drove with them in this condition. This was undisputedly a violation of DOT and Airgas safety policy that risked cylinders becoming completely loose and falling off the truck while on the road.
- Even Rottinghouse did not contest that he was responsible for securing the cylinders and that some form of discipline was appropriate. He contends only that the Respondent should have given him a verbal warning rather than a written one.
- There is no direct evidence of animus borne by Froslear or any other official of the Respondent against the filing of unfair labor practice charges or participation in Board proceedings.
- In addition, there is no credited evidence that the warning was issued against a background of any independent unfair labor practices supporting a finding of animus. The General Counsel does not contend that Rottinghouse's prior 3-day suspension was unlawfully motivated, and the judge specifically found, based on her credibility findings, that Froslear did not threaten on April 28 to change disciplinary policy in response to unfair labor practice charge filings.<sup>11</sup>

The paragraphs below address each of the factors relied upon by the judge, based on circumstantial evidence, which prompted the judge to find that the General Counsel met the initial *Wright Line* burden and that the Respondent's reliance on Rottinghouse's safety violation was pretextual.

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ipate in investigation in the latter, that they should have known Rottinghouse participated as well in Board investigation of both charges. I find no need to pass on this inference, which is unnecessary to the *Wright Line* analysis of the knowledge factor.

<sup>10</sup> Inasmuch as my colleagues essentially reiterate the judge's analysis, there is little need for separate discussion of their opinion.

<sup>11</sup> I note that in a subsequent unfair labor practice proceeding involving the same parties, a different judge found that Froslear did make the alleged April 28 threat. *Airgas USA, LLC*, 366 NLRB No. 92, slip op. at 3 (2018). That finding is not a part of the record in this case. Even if it were, I believe this background evidence would be insufficient to support finding that the General Counsel met the initial *Wright Line* burden of proving that animus against Rottinghouse's Board-related activity motivated his August 6 warning.

1. *Credibility findings are not dispositive of the motivational issue.* The Respondent did not challenge any of the judge's credibility findings supporting her finding of discriminatory motivation, even though they were not predominately based on her observation of witnesses' demeanor. Accordingly, I accept the judge's findings that Froslear did not observe cylinders fall or tilt and that he did see Rottinghouse in the vicinity of his truck on August 3 but chose not to speak with him.<sup>12</sup> However, there are limitations on the extent to which credibility findings can prove unlawful motivation associated with an unfair labor practice charge. As the Board long ago stated, "*the question of motivation where an alleged unlawful discharge [or other adverse action] is involved is not one to be answered by crediting or discrediting a respondent's professed reason for the discharge, and thus we cannot accept every credibility finding by a trier of fact as dispositive of that issue. Rather, that question is one to be resolved by a determination based on consideration and weighing of all the relevant evidence.*"<sup>13</sup>

In this case, the judge's finding that Froslear was "out to get" Rottinghouse and seized upon the cylinder incident as a pretext for doing so cannot be reviewed simply as the product of her credibility findings. The Board must instead consider and weigh all of the evidence relevant to the Respondent's motivation.

2. *The timing of the warning was not suspicious.* The judge inferred animus from the fact that Froslear issued the August 6 warning a month after Rottinghouse filed the charge in Case 09-CA-155497 alleging that his 3-day suspension violated Section 8(a)(4) of the Act and about 3 weeks after Froslear and Luehrmann gave Board affidavits relevant to the prior charge filed in Case 09-CA-152301. It is well established that an inference of animus may in certain circumstances be based in part on the timing of discipline relative to an employee's protected activity. The operative word is "may," not "must," and no inference is warranted based on the coincidental sequence of events in this case. The determinative intervening event proximate to the warning was Rottinghouse's own observed and undisputed safety violation in failing to secure the cylinder load 3 days before receiving the warning, not his filing of a charge with the Board a month earlier or the subsequent taking of Board affidavits from company officials.

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<sup>12</sup> As discussed below, I would not "affirm" her purported discrediting of Froslear's testimony that he would not have let Rottinghouse leave the yard without fixing the safety problem and that he issued the warning letter as a form of progressive discipline.

<sup>13</sup> *Charles Batchelder Company*, 250 NLRB 89, 89-90 (1980) (emphasis added).

3. *Froslear's actions on August 3 and 4 were objectively logical.* The judge inferred an intent to punish Rottinghouse for protected conduct from Froslear's "complete lack of concern" for safety. She based this on Froslear's failure to address the unsecured cylinder issue with Rottinghouse directly and immediately, his failure to physically examine the cylinders to see if they were loose, his willingness to watch Rottinghouse from inside the plant, the absence of any evidence that Froslear would have stopped him from driving out of the yard without having properly straightened and resecured the cylinders, and his email inquiry to driver trainer MacBride about where he could find the "strongest language about load securement that drivers are trained to."

The entirety of this part of the judge's analysis is impermissibly speculative and subjective, imposing her own judgment of proper safety procedures on the Respondent without any proof from the General Counsel of their objective necessity or a departure from the Respondent's own past practice. Most egregious was the judge's finding that there was no evidence leading her to believe Froslear's testimony that he would not have let Rottinghouse drive out of the yard without addressing the safety issue. This was total speculation about a hypothetical alternative to what actually took place. There is nothing in this actual factual scenario to suggest that Froslear evinced a lack of concern for safety by waiting a short while to observe what Rottinghouse would do or that he could not see Rottinghouse secure the cylinders from his observation spot inside the plant. Rottinghouse saw Froslear taking pictures and, without Froslear having to speak with him (or Rottinghouse asking Froslear if there was a problem), inspected his load and understood that he needed to straighten and secure the cylinders before driving out of the yard. He credibly testified that he did so. When Froslear saw to his satisfaction that Rottinghouse properly secured the cylinders—again, there is no evidence that he could not see this—there was no reason for him to stop Rottinghouse from driving out of the yard.

There also is no basis for the inference drawn by the judge that Froslear's failure to physically examine the cylinders demonstrated his lack of concern for safety. Froslear undisputedly observed and photographed unsecured cylinders. He did not need to physically examine them to verify this as a safety violation. Instead, he logically sought the expert opinion of driver trainer MacBride, who confirmed a DOT violation and "unacceptable" conduct based solely on his review of the picture Froslear emailed to him. For that matter, coworker Oestreicher testified that, sight unseen, he told Rottinghouse

he would probably be *written up* after Rottinghouse said that Froslear was taking pictures of loose cylinders.

The judge's analysis also suggests that Froslear's "out to get you" attitude towards Rottinghouse is shown by his "insistence" in his August 4 email to MacBride, that the driver trainer find the "strongest" language about securing cylinders. Froslear did not insist on anything. His email inquired where he, not MacBride, could find the "strongest" language. MacBride referred Froslear to the driver training manual, and Froslear quoted appropriate language from it in the warning letter. Moreover, what is irrational or suspicious about a manager asking the company expert on driver training and safety where the manager could find the "strongest language" supporting the expert's opinion that an unidentified driver engaged in the "unacceptable" action of transporting an insecure load? Apparently, the judge subjectively believed that use of the "strongest" modifier exposed Froslear's intent to impose more severe discipline than was warranted, but the record falls woefully short of objectively proving that this must have been so.<sup>14</sup>

4. *There was no disparate treatment.* In circumstances where the General Counsel relies on evidence of disparate treatment to meet the initial *Wright Line* burden of proving that discipline was motivated by animus against protected activity, the Board has stated that "evidence of a 'blatant disparity is sufficient to support a prima facie case of discrimination.'" *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998), quoting *Fluor Daniel*, 304 NLRB at 970–971.<sup>15</sup> The evidence here falls far short of proving a "blatant disparity" in giving Rottinghouse a written warning rather than a verbal warning. The

<sup>14</sup> When the General Counsel asked Froslear why he was asking for the strongest language, Froslear answered, "I'm not – since Mark MacBride is a driver's trainer, he's a resource for me as to what are exactly other drivers taught to. I wanted to make sure that I didn't just guess at what the material would have been to address this problem." Asked again why he was looking for the strongest language, Froslear replied, "Key words: 'Nesting, secure, no rattling.' Those types of things. To make sure that when we teach somebody they fully understand, it has to be secure. And secure means a lot of things." The judge did not specifically address this testimony, which seems to provide a reasonable explanation for Froslear's inquiry. Even if she implicitly discredited that testimony, the record does not support drawing a contrary inference that the search for "strongest language" indicated Froslear's intent to impose more severe discipline than was warranted.

<sup>15</sup> My colleagues correctly state that a lesser showing of disparity may suffice to meet the General Counsel's initial *Wright Line* burden of proving animus when viewed in conjunction with other evidentiary factors. As stated in this opinion, I find there is no other credible and objective supporting evidence establishing animus attributable to the Respondent. Moreover, as stated below, I find that the isolated instance of inconsistency in the Respondent's prior disciplinary practice is insufficient to prove *any* significant disparity, much less a blatant disparity that might standing alone meet the *Wright Line* burden.

judge's contrary view suffers from the same speculative and subjective flaws as discussed above.

Rottinghouse received the same written warning for the same safety violation as Huff received in 2011. The judge rejected the notion that the incidents were comparable and deserved the same level of discipline because cylinders were less secure or completely loose in Huff's truck and were only leaning slightly in Froslear's truck. There is not a scintilla of record evidence that the DOT or Airgas makes this distinction in defining what constitutes an unsecure cylinder safety violation or what the disciplinary consequences should be for such a violation. In fact, the only evidence is Froslear's uncontradicted testimony that no distinction is made.<sup>16</sup> Even accepting the judge's unsupported subjective view that the Huff and Rottinghouse violations are distinguishable, the fact is that the Respondent additionally required Hull to review driver safety requirements for securing cylinders with his supervisor and to ride with a driver trainer. Rottinghouse was warned but not required to take any additional remedial training. The judge somehow twists this fact into alleged further evidence of disparate treatment, apparently reasoning that, if the remedial training requirements (*which are not shown to be disciplinary*) were not imposed on Rottinghouse, he should not have received a written warning at all.

The judge also found disparate treatment based on the Respondent's issuance of verbal warnings to two drivers for incidents that she viewed as more serious than Rottinghouse's. She found it "incredulous" that Reed received a verbal warning for talking on the phone while driving, a DOT safety violation that could have resulted in substantial fines for driver and employer. As previously noted, Froslear initially gave Reed a written warning for this incident. Consequently, he and Rottinghouse received the same discipline for a serious safety violation. Reed's discipline was later reduced to a verbal warning a month later. There is no record explanation of the circumstances leading to this reduction in discipline. It was the General Counsel's burden, not the Respondent's, to produce this evidence in support of his prima facie case. Absent such evidence, there is no basis to infer that the failure to make the same reduction in Rottinghouse's discipline was disparate treatment. Moreover, even comparing the written warning given to Rottinghouse to the oral warning ultimately given to Reed,

the judge's finding of disparate treatment rests on her subjective view that Reed's safety violation was more serious than Rottinghouse's. This finding contravenes the well-established doctrine that "[t]he decision of what type of disciplinary action to impose is fundamentally a management function,"<sup>17</sup> and that "Congress never intended to authorize the Board to question the reasonableness of any managerial decision nor to substitute its opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient."<sup>18</sup>

As for the verbal warning issued in 2012 to Jeffries for a preventable vehicle backing accident, the Respondent admits in its brief in support of exceptions that the failure to give him a written warning was a mistake. Indeed, less than a year earlier, the Respondent gave employee Bowman a written warning for a backing accident. Still, the failure to give Jeffries a written warning represents a single incident of inconsistent discipline in record exhibits covering a 5-year period. This incident is not sufficient to prove any real disparity in disciplinary practice, and it cannot possibly suffice to prove the requisite "blatant disparity" in treatment of Rottinghouse's safety violation that would, standing alone, warrant an inference of animus in support of the General Counsel's prima facie case.

5. *Froslear did not offer shifting or inconsistent reasons for discipline.* Froslear did not mention Rottinghouse's prior DOT violation—the one for which he received a 3-day suspension—in the written warning, or in the discussion of that warning and its grievance with Rottinghouse and his union representatives on August 6 and September 2. He had no apparent reason to do so on those occasions, inasmuch as (1) he regarded the failure to properly secure cylinders to be a serious safety violation warranting a written warning even for a first offense, and (2) according to his credited notes of these discussions, no one suggested on Rottinghouse's behalf that the warning should be reduced to verbal because it was a first offense. Union agent Butts raised this argument for the first time during the grievance meeting on September 23. Froslear rejected it, stating "[n]o because it is not Steve's first DOT violation *and* because of the severity of this event." Contrary to the judge, this response, and its reiteration during Froslear's testimony, did not represent either a shifting or inconsistent reason for the writ-

<sup>16</sup> "Q. (General Counsel) And are you saying that a loose 12 cylinder – completely loose, not secure – a pallet with unsecured cylinders and a pallet containing liquid containers only secured with one strap is equal to what Mr. Rottinghouse – to this?"

A. (Froslear) I do. Unsecured is unsecured."

<sup>17</sup> *Neptco, Inc.*, 346 NLRB 18, 20 fn. 15 (2005) (quoting *Midwest Regional Joint Board v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977)).

<sup>18</sup> *Id.* at 20 fn. 16 (quoting *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444–445 (5th Cir. 1978)).

ten warning.<sup>19</sup> From August 6 on, including throughout this proceeding, the Respondent has consistently maintained that the written warning was appropriate for the first-time offense at issue. Further, as discussed above, the record shows that the Respondent issued a written warning to Huff for the same DOT safety violation and that it also issued written warnings and even imposed suspensions for other first-time serious safety violations. Froslear's reply to Butts on September 23 represented no shift or inconsistency in the rationale for Rottinghouse's warning. It only refuted Butts' claim, not previously made, that the August 3 unsecured cylinder incident was Rottinghouse's first DOT safety offense.

For that matter, Butts' first offense claim on September 23 at least implicitly suggests his view that a written warning *would be* appropriate for a second DOT safety violation, even if not for a first violation. I note that the Regional Director's dismissal of the charge in Case 09–CA–155497 one day earlier, on September 22, removed any doubt that the suspension of Rottinghouse for a prior DOT violation was lawful.

#### Conclusion

I believe a review of the entire record shows that Froslear legitimately relied solely on Rottinghouse's serious safety violation when issuing a written warning; but even assuming that the judge correctly found Froslear was "out to get" Rottinghouse, I also believe the General Counsel failed to meet his initial *Wright Line* burden of proving that Froslear was motivated to do so by animus against Rottinghouse's protected recourse to the Board's processes. Under our Act, "Management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge [or discipline] when the real motivating purpose is to do that which [the Act] forbids."<sup>20</sup> Further, "[w]here the employer has proper cause for discharging an employee, the Board *may not rely on scant evidence*

<sup>19</sup> The judge stated that she did not believe Froslear's testimony that he issued the written warning as a form of progressive discipline. This was clear error because Froslear never testified that he did so, even when pressed by the General Counsel and the judge. In response to a leading question from the General Counsel as to whether Froslear told Rottinghouse or Perkins "that this is a written warning because of the progressive discipline policy," Froslear replied, "I mentioned to him that it wasn't his first offense. *And the severity of it warranted a written warning.*" (Emphasis added.) When the General Counsel repeated, "Did you specifically mention progressive discipline," Froslear replied, "I mentioned that this wasn't his first offense." The judge then directed Froslear to answer this question "yes or no." Froslear replied, "Progressive? I don't remember."

<sup>20</sup> *Anheuser-Busch*, 351 NLRB 644, 647 (2007); *Taracorp*, 273 NLRB 221, 222 fn. 8 (1984) (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)).

*and repeated inferences to make a finding that places the Board in the position of substituting its own ideas of business management for those of the employer.*"<sup>21</sup> Though armed with the best intentions, I believe my colleagues and the judge in this case have impermissibly substituted their judgment as to what type of discipline was warranted based on Rottinghouse's deficient performance.

In my view, the record strongly supports the same conclusion here as made by the General Counsel in affirming dismissal of Rottinghouse's charge contesting his prior suspension—specifically, "there was no objective evidence of hostility linking the Employer's decision to your participation in Board proceedings." Accordingly, I respectfully dissent from my colleagues' adoption of the judge's finding that Rottinghouse's written warning was unlawful, and I believe the complaint should be dismissed.

Dated, Washington, D.C. June 13, 2018

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Marvin E. Kaplan,

Member

*Erik P. Brinker, Esq.*, for the General Counsel.

*Michael C. Murphy, Esq. (Radnor, PA)*, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on February 16, 2016. Steven Wayne Rottinghouse, Jr. (Rottinghouse), the Charging Party, filed the charge on August 24, 2015.<sup>1</sup> The General Counsel issued the complaint on November 18. In its December 7 answer, Airgas USA, LLC (Respondent/Airgas) generally denied all alleged violations of the Act.<sup>2</sup>

The complaint alleges that Respondent violated Section 8(a)(4) and (1) of the National Labor Relations Act (the Act) when it issued a written warning to Rottinghouse in retaliation for providing affidavit testimony and filing charges in other cases before the National Labor Relations Board (the Board).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a Delaware limited liability company, has been engaged in the retail sale and distribution of industrial gases

<sup>21</sup> *NLRB v. Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955) (emphasis added).

<sup>1</sup> All dates are in 2015 unless otherwise indicated.

<sup>2</sup> For brevity purposes, counsel for the General Counsel will be referred to as the "General Counsel."

and related products at its office and facility located at 10031 Cincinnati-Dayton Road, in Cincinnati, Ohio (Respondent's facility/Cin-Day plant). In conducting its business during the 12-month period ending on November 1, Respondent derived gross revenues in excess of \$500,000. During the same period, Respondent has also purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Ohio. Respondent admits by stipulation, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Tr. 11.)<sup>3</sup>

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

#### 1. Airgas management

Respondent has operated its sale and distribution of industrial gases business at its Cin-Day plant for about 8 years. At all relevant times, Clyde Froslear (Froslear) has been Respondent's operations manager over several of Respondent's facilities, including the Cin-Day plant which is central to this case. He oversees all operations including, but not necessarily limited to, production, distribution, safety, labor relations and employee relations. David Luehrmann (Luehrmann) is the Cin-Day plant manager, who directly manages the day-to-day plant activities and employees. Both he and Froslear discipline employees for any safety or other violations, but he generally does so with Froslear's input and approval. There is no dispute that Froslear approves discipline and tries to attend most disciplinary meetings. Along with his managers, he typically signs or initials most discipline.<sup>4</sup>

#### 2. Airgas drivers

Airgas hires drivers to transport various industrial gases on trucks with trailers. These compressed gases are housed in cylinder tanks (also referred to as cylinders, tanks, and sometimes bottles). Drivers must secure them inside metal cages or pallets with straps and ratchets; and fasten them onto the trailers. However, some of the cylinders are preassembled by other employees (assemblers) into 6 or 12-pack cradles (also referred to as packs or banks), and bolted together and secured inside their own cages. The drivers are not responsible for securing the cylinders/tanks inside these cradles, but must make sure that the cradles are properly secured to the trailers. Employees therefore are not disciplined if the cylinders inside these cradles or packs sometimes move or rattle.

According to Froslear and Respondent's driver trainer, Mark MacBride (MacBride), the drivers are supposed to properly "nest" the cylinders (which are not preassembled in 6 or 12-pack cradles) and secure them with two straps so that each one

is nesting tightly against another.<sup>5</sup> Respondent's drivers are either assigned city routes within a 50-mile radius each way from the plant, or they are assigned long distance routes over 50 miles each way. City drivers must check to make sure their loads are secure at each stop, while long distance drivers must do so at least every 50 miles.

The Department of Transportation (DOT) regulates the manner in which Respondent and its drivers transport and secure cylinders. According to Respondent's driver training manual (revised December 1, 2014), this "means that cylinders must be strapped, chained or secured to the vehicle so that they do not move or rattle." Other relevant parts of this manual require that:

Small cylinders must be secured as well. You cannot transport cylinders if they have the ability to roll around, such as in a box or cage. Special care must be taken when transporting small cylinders. Please work with your supervisor to correct any cylinder transportation problems.

(GC Exh. 6, pp. 3–7.) In various safety meetings, employees viewed several power point presentations on pallet, strap and load handling and securement. Relevant portions of those slides focused on the importance of pallet handling and general hazards associated with it such as loose cylinders falling and unsecured loads during transportation. One of the slides on physical loading and unloading dealt with the use of "proper cylinder nesting techniques" and use of "the back brace when strapping small quantities of cylinders to secure the load." (GC Exh. 6, pp. 7–11, 15–17.)

Respondent also provided employees with safety training on compliance, safety and accountability (CSA) in 2014. Commercial motor vehicle (CMV) drivers, such as Respondent's employees, along with their employers, receive citations and fines during DOT and other law enforcement roadside stops for violating DOT regulations and/or committing one of the "Seven Basics" of CSA. One of those basics is "Cargo Related (Load Securement), under which "[f]ailing to properly secure the load . . ." is listed. (See GC Exh. 6, pp. 5–12.)

#### 3. Charging Party Rottinghouse and his protected activities

Charging party Rottinghouse is one of Respondent's experienced commercial drivers at the Cin-Day plant, who drives both city and longer distance routes. The record reveals that prior to late June 2015, he maintained good safety and driving records, with no DOT or Airgas rule violations. Training records show that he attended and satisfactorily completed the various safety trainings and presentations provided by Respondent, including those described above on proper load securement. (GC Exh. 6.)

Rottinghouse was an active member of the Union. In addition, prior to the underlying charge in this case, he filed two other charges with the Board. In the first, Case 09–CA–

<sup>3</sup> Abbreviations used in this decision are as follows: "Tr." for Transcript; "GC Exh." for General Counsel Exhibit; "R. Exh." for Respondent Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for General Counsel's Brief; and "R Br." for Respondent's Brief.

<sup>4</sup> The parties also stipulated that Froslear and Luehrmann are Respondent's supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act. (Tr. 11.) The parties' other stipulations are set forth at Jt. Exhs. 1–10.

<sup>5</sup> MacBride trains new Airgas drivers on policies and safety procedures. He also rides with all drivers, including the experienced ones, each year and reviews policies and procedures dealing with safety, DOT compliance and policy updates. At the end of each trip, he points out any problem areas that drivers need to work on, and documents his review. (Tr. 193–194.)

152301, filed on May 14, 2015, he alleged that in April safety meetings, Froslear threatened to change employees' terms and conditions of employment because of his filed grievances and Board charges. More specifically, at issue were Froslear's comments about disciplinary policy during two April 28 employee safety meetings. Froslear and Luehrmann provided affidavit testimony in that case (on July 13), which was subsequently resolved on September 9, 2015. (Jt. Exh. 5; GC Exh. 2).<sup>6</sup> In the second, 09-CA-155497, filed on July 7, 2015, he alleged that Respondent suspended him for 3 days in retaliation for protected union activities and filing charges with the Board. Respondent suspended him for dishonesty and deliberate, severe violation of Airgas and Department of Transportation (DOT) policy when on June 22, he completed DOT paperwork off the clock. Froslear testified that he would have terminated Rottinghouse for this offense, but instead followed his legal counsel's advice not to do so. On September 22, 2015, the Regional Director dismissed this charge due to insufficient evidence to establish a violation of the Act. (Jt. Exh. 6.) On November 5, the Board denied Rottinghouse's appeal of that dismissal. (Id.)

Rottinghouse and Froslear also attended a grievance meeting on August 5 concerning his prior 3-day suspension.<sup>7</sup> (Tr. 61-62; 147-148.)

#### *B. August 3, 2015 Incident, Its Aftermath and Discipline*

##### *1. August 3 incident*

On the morning of August 3, Rottinghouse left the Cin-Day plant in his truck along with a coworker, Robert Oestreicher.<sup>8</sup> They went to a General Electric (GE) facility, and while there, made several stops to pick up empty cylinders. One of those stops at GE was a "training stop," where Oestreicher showed him how to lift a 12-pack cradle of cylinders with a crane.<sup>9</sup> Rottinghouse also carried at least one other load of cylinders, attached to a metal pallet with two straps, on his truck. When they left GE, they returned to Respondent's facility.

Upon reaching the Cyn-Day plant, Rottinghouse stopped his truck, got out and opened the entrance gate. After returning to his truck and driving forward a bit, the gate blew back towards his truck, causing him to abruptly hit the brakes in order to

avoid hitting the gate.<sup>10</sup> At that point, without having to get out, he pushed the gate back away from his truck, and proceeded through the entrance and parked his truck in Cyn-Day plant's yard close to the building. Both he and Oestreicher left the truck and entered the plant/building.

Rottinghouse claimed that once inside, he saw and made eye contact with Froslear, who was about 20 feet away from where he (Rottinghouse) stood in the break room near the mailboxes. They did not speak. After using the restroom, he proceeded back out to his truck, and saw Froslear taking a picture with his phone. He testified that he walked around the driver's side to the back of the truck to see what Froslear was looking at. He stated that as he approached the back of the truck from driver's side, he and Froslear, who was about 10-15 feet away on the rear passenger side, made eye contact with each other. He further testified that as he continued on to the rear passenger side to the truck's lift controls, Froslear walked back into the building without saying a word. It is undisputed that next, Rottinghouse climbed onto the back of his truck, and straightened and re-strapped four leaning cylinders. After doing so, he got into his truck, left the Cyn-Day plant and completed his route. (Tr. 139-144, 146.)

According to Froslear, he was standing by his car in the parking lot near the plant entrance when he witnessed Rottinghouse pull into the driveway, stop to open the gate and continue on to park in the yard.<sup>11</sup> He testified that at the same time, he also "heard . . . rattling" and "witnessed cylinders falling" on the back of Rottinghouse's truck when it "came to a stop." When asked if he actually saw them fall, Froslear admitted that they did not fall down, but "tilted" over 10-15 degrees. (Tr. 28-29.) He testified that "[w]hen [Rottinghouse] entered the yard until he came to a stop, they [the cylinders] were standing straight up. When he came to a stop, they tilted." When asked exactly when he saw the cylinders move, he responded that "I saw them tilt when he came to a stop in the yard," and not at the gate. (Tr. 31-32, 34.) Next, Froslear went back inside the building, retrieved his cell phone and safety glasses and proceeded out to photograph the cylinders on the back of Rottinghouse's truck. Froslear never physically examined or even touched the cylinders, but testified that he did not need to do so because he had seen them move. Afterwards, he went back inside the plant where he observed Rottinghouse (from a window) fix the leaning cylinders. (Tr. 28-30, 37-38, 65.)

Froslear denied seeing Rottinghouse at any time after he [Rottinghouse] parked his truck in the yard. He testified that he was too busy concentrating on getting his camera and safety glasses; he also claimed not to have known where Rottinghouse was. He admitted, however, that he saw no need to try to find

<sup>6</sup> On August 20, the Regional Director approved withdrawal of the 8(a)(3) and (4) charge allegations. The settlement included a notice posting that Respondent would not "threaten to change" its discipline policy due to prior charges or participation in the Board process; it did not contain a nonadmissions clause. (Jt. Exh. 5(d).)

<sup>7</sup> Froslear recalled that such a meeting took place, but not the date on which it occurred. Since he could not rebut that it did occur on August 5, I credit Rottinghouse's testimony that it did. (Tr. 61-62; 147-148.)

<sup>8</sup> When asked on cross-examination, Oestreicher admitted that he was not only Rottinghouse's co-worker, but also his stepfather. (Tr. 177.)

<sup>9</sup> Froslear testified that he did not know about Oestreicher riding with Rottinghouse on August 3, but no one disputed that Oestreicher did so. (Tr. 38-39, 134-137, 168.)

<sup>10</sup> I credit Rottinghouse's testimony that he made an abrupt, "hard" stop at the entrance gate. Oestreicher supported it, stating that Rottinghouse "stepped on his brakes real hard," and had to reopen the entrance gate. (Tr. 167-169.) Froslear denied seeing Rottinghouse make an abrupt or hard stop at the gate, but did not dispute that it might have occurred. (Tr. 30-35; Jt. Exh. 9.)

<sup>11</sup> Both Oestreicher and Rottinghouse testified that they observed Froslear standing by his car when they pulled into the plant. (Tr. 137-138, 170.)

or talk to him at any time on August 3 since he witnessed the cylinders tilt and Rottinghouse sufficiently secure them. (Tr. 38–39, 42). In fact, he swore that he would not have allowed a driver to return to the road with a “serious safety issue” without first ensuring that it had been corrected. (Tr. 37.) For reasons discussed below, I discredit Froslear’s testimony that he did not see or know where Rottinghouse was, and that he actually witnessed the cylinders tilt over.

There is no dispute that the photograph that Froslear took accurately depicts the condition of the leaning cylinders in question after Froslear parked his truck in the Cyn-Day plant’s yard. It reflects four cylinders leaning slightly to the left—three tall cylinders in the back row with one shorter, smaller leaning against the front of two of the taller ones. It also shows two straps, fastened with ratchets, around the cylinders. The lower strap, however, drapes down the front of the shorter, smaller cylinder in front. (See Jt. Exh. 2.)

## 2. Froslear’s actions on August 4

On August 4, Froslear sent an email to Respondent’s driver trainer, MacBride, with an attached photograph of the leaning cylinders on the back of Rottinghouse’s truck. He asked MacBride “What do you think about this? Look good to you?” MacBride responded, “[n]o with the cylinders being offset we would be hit for insecure load just by how it looks. Where is this truck.” Froslear replied, “CinDay.” MacBride stated, “[n]ot good, did the driver catch it before leaving,” to which Froslear replied “I saw it when he pulled into the yard.” MacBride then asked “Did it get fixed before leaving,” and MacBride responded, “[t]his is the way it was when he pulled in after his run.” MacBride emailed back “Unacceptable” Froslear then asked “[w]here would I find the strongest language about load securement that drivers are trained to?” MacBride told him that he could find such “[i]n the driver training manual.” Finally, Froslear told MacBride to call him when he had time, and “to zoom in on how the cylinders were strapped down.” During this email exchange, Froslear did not tell MacBride that Rottinghouse had been driving the truck in question, nor did he tell him that Rottinghouse fixed his load before returning to the road. (Tr. 116–117; Jt. Exh. 3.)

## 3. Rottinghouse’s discipline and grievance meetings<sup>12</sup> August 6 discipline meeting

On August 6, Froslear and Luehrmann met with Rottinghouse and issued him a written warning letter (dated August 5) for failing to secure cylinders.<sup>13</sup> Barry Perkins (Perkins), union representative, attended the meeting on Rottinghouse’s behalf. The warning letter stated:

On Monday afternoon, 8/3/15, Clyde Froslear was in the parking lot when he heard rattling and saw you pulling into

the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise.

You have been trained on the proper way to secure cylinders while being transported. According to the Driver Training Manual, ‘cylinders must be strapped, chained or secured to the vehicle so that they *do not move or rattle.*’

### Recommended correction action:

As an Airgas Driver, you are expected to take personal responsibility for creating and maintaining a safe environment and to perform your job with the understanding that working safely is a condition of your employment with Airgas. For this reason you are expected to properly secure cylinders when transporting them, as well as follow all other DOT procedures while performing any other duties related to your job.

### Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers, and the general public. It is your responsibility to follow Airgas’ standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

Rottinghouse refused to sign the warning letter. Luehrmann signed it; Perkins signed as a witness; and Froslear initialed it. (Jt. Exh. 1; 4, p. 19.)

During that meeting, however, Froslear explained that when he saw Rottinghouse pulling into the yard, he “heard loose cylinders rattling and when [Rottinghouse] came to a stop saw them move, fall forward.” Rottinghouse told Froslear that he saw him taking pictures, and asked why he (Froslear) did not come to get him. Froslear responded that he “took the pictures so [he] could send them to our driver trainer Mark MacBride for his opinion.” Rottinghouse said that the “rattling noise was coming from a HY bank.”<sup>14</sup> Froslear asked why he decided to return to the trailer and fix the leaning pallet of cylinders if the noise was coming from a HY tank. Rottinghouse responded, “[b]ecause I saw you taking pictures.” Then, Froslear asked how Rottinghouse knew that he “was not taking pictures of the tailgate or the trailer.” Next, Rottinghouse asked to see the pictures. Froslear answered that he would “be glad to, but not right now.” He further stated that “[t]he picture will show the same thing you saw and the reason you got back up on the trailer to fix. If you are arguing that the pallet was not the cause of the rattling noise, why did you get back up on the trailer, rearrange the straps and tighten the load down?” Then, Rottinghouse refused to sign the letter, and the meeting ended. (Jt.

<sup>12</sup> Froslear took notes of each of these meetings, which were submitted by the parties as joint exhibits (Jt. Exhs. 7, 9–10.) I credit these notes as being an accurate version of what was said during the meetings. Neither Rottinghouse nor his union representative, Barry Perkins, disputed the accuracy or contents of Froslear’s notes.

<sup>13</sup> The parties stipulated that the warning letter, dated August 5, was issued on August 6.

<sup>14</sup> HY bank refers to a 12-pack cradle of hydrogen cylinders. No one disputed Rottinghouse’s testimony that these cylinders were empty when he returned to the Cyn-Day plant on August 3.

Exh. 7.)

Several minutes later, Perkins returned to Froslear's office, presented him with Rottinghouse's grievance #29582 filed with Local 100, and asked to see the pictures that he had taken. Froslear showed him the pictures. According to Froslear's notes, both he and Perkins "agreed the pictures show the cylinder[s] were loose and could understand why Steve fixed them before leaving." (Id.)

The grievance/claim stated in relevant part the following:

[O]n 8-6-15 Received write up for 'loose cylinders' on truck 8-3-15. Written warning issued. Only Should Be Verbal. Cylinders are leaning a little bit But not Rattle. Rattling cylinders were from Hy C23 with loose cyls. Requested pictures for union. Refuse to show pictures . . . Leaning cyls were fixed Before leaving yard written warning is excessive, Should Be Removed

(Jt. Exh. 8.)

#### September 2 grievance meeting

Rottinghouse and Perkins met with Luehrmann and Froslear again on September 2. Rottinghouse explained why he should not have received a warning letter. He stated that "[w]hile pulling into the yard the gate started to close. I hit my brakes which cause the cylinder to lean forward. I got up on the trailer and fixed the load before leaving. This all happened in the yard and I should not have received a warning letter." Froslear responded:

Not true. You had just come off the road and the cylinders were not strapped securely. So it didn't happen in the yard. If they were strapped securely hitting the brakes would not cause cylinders to lean. I have seen trailers turned over and cylinders still strapped in place. So I don't think hitting brakes would do this, do you?

(Id.) Rottinghouse replied that "[i]t's possible."

When asked by Froslear what part of article 22 of the CBA Respondent violated, Perkins responded that the "warning letter should have been a verbal according to the contract." Froslear pointed out that article 22, paragraph A states that a "Written warning notice stating violation will be given to employee." Rottinghouse repeated that the written warning "is too severe; it should have been a verbal." When Froslear refused to change the discipline to a verbal warning, the meeting ended. (Jt. Exh. 9.)

#### September 23 grievance meeting

The parties met once more on September 23, with Ron Butts, another union representative, and Barry Perkins representing Rottinghouse, and Luehrmann and Froslear for Respondent. Butts read the grievance and said that they were there "to reduce this to a verbal." Froslear asked Butts to read article 22, paragraph A. At that point, Rottinghouse interrupted, stating that "the rattling was not the cylinders in question but cylinder in a hydrogen bank." Froslear's notes reflected his response:

Explained to RB [Ron Butts] since he is not familiar with a cylinder bank, that there might have been additional rattling coming from the hydrogen bank but the cylinder[s] are se-

cured inside a steel cage. They are very secure and would not come out and possibly fall on to the highway. The cylinders we are talking about today were loose and could fall off the trailer.

(Jt. Exh. 10.)

Finally, in response to Froslear's question about which part of the contract he had violated, Butts said that "[Rottinghouse] thinks the warning should be reduced to a verbal since this was his first offense." Froslear pointed out that this was not the first offense. Butts then asked if the warning letter would stay in Rottinghouse's file for 12 months, Froslear said that it would. Butts asked again if Froslear would reduce the written warning to a verbal one, and Froslear still refused to do so, stating "[n]o because it is not Steve's first DOT violation and because of the severity of this event." (Id.)

Butts then stepped out to talk to Perkins and Rottinghouse. Afterwards, Butts told Froslear that he considered the matter "deadlocked," and would be sending a letter documenting the Union's intentions to arbitrate and present the matter to the "Unions Board." (Id.)

#### C. Respondent's Discipline Policies and Discipline Issued

##### 1. CBA

The collective-bargaining agreement (CBA) between Respondent and the Union Local 100,<sup>15</sup> article 22 (rights of management section), set forth the manner in which Respondent should take disciplinary action against employees who violated rules and regulations. Its relevant parts state:

Disciplinary action taken by the Employer for violation of either Company rules and regulations or employees' violations of articles contained herein, will be handled in the following manner:

A. Written warning notice stating violation will be given to employee, with a copy to Union and Union Steward and a copy becomes part of the employee's personnel file;

B. This written notice to be given within five (5) working days of said violation;

E. The warning letter shall remain active in an employee[s] file for a period of twelve (12) months from the date of such letter. After twelve (12) months, a warning letter will not be used for progressive discipline.

F. Suspensions shall remain active in an employee file for a period of eighteen (18) months. After eighteen (18) months a suspension will not be used for progressive discipline.

(Jt. Exh. 4, p. 16.) Therefore, according to the CBA, all disci-

<sup>15</sup> The collective-bargaining agreement (CBA) between Respondent and the Truck Drivers, Chauffeurs and Helpers, Public Employees, Construction Division, Airlines- Greater Cincinnati/Northern Kentucky Airport and Miscellaneous Jurisdiction, Greater Cincinnati, Ohio Local Union 100, an affiliate of the International Brotherhood of Teamsters (the Union/Local 100) was effective from December 1, 2012 through November 30, 2015.

pline began with a written warning letter; there was no mention of or provision for any type of verbal warning. (Jt. Exh. 4, p. 16.)

## 2. Airgas procedure/policy

There is little dispute that the Cin-Day facility management discipline policy departed from the CBA's article 22. However, there was some disagreement, inconsistency, and apparent confusion on Froslear's part, as to when and how it did so. When asked at hearing how Respondent's employee "progressive discipline policy" works, Froslear stated that "[f]or minor offenses, in the past we would verbally approach the employee and tell him what was going wrong. Per the contract, it starts at written and then it's suspension."

As previously stated, Froslear addressed Respondent's disciplinary policy during two safety meetings with employees in April (28th). When asked if he told employees in those meetings that they would receive verbal warnings for minor offenses, he responded that "during the meeting, what I told them was that, moving forward, we were going to no longer—a verbal pat on the back, hey, you forgot your safety glasses, that we were going to have to document it." (Id.) However, in connection with Case 09-CA-152301, he gave sworn Board affidavit testimony that:

At the meeting I wanted to make clear to the employees that once they violated a rule for the second time, they would receive a written warning...In the collective bargaining agreement for this facility...the disciplinary process says that an employee will...get a written warning after the first violation of rule... However, for example, if we see an employee not wearing safety glasses we will first tell that employee to make sure they are wearing their safety glasses. However, if we see the same infraction again we will give that employee a written warning.

(Tr. 25-26; GC Exh. 2.) After reading his affidavit testimony, Froslear backtracked, and added that in those meetings, he told the team that "... moving forward we were going to document that conversation as a progressive discipline. I want to document everything moving forward." (Tr. 27.) When asked why he stated in his affidavit that "[a]t the meeting I wanted to make clear to employees that once they violated a rule for a second time they would receive a written warning," he said that "the first one's going to be a verbal documented. The second one would be a written document. All will be documented." (Id.) He also claimed that he issued warning letters to employees who repeated minor offenses and to employees who committed major or serious first time violations. This is a clear departure from his affidavit, in which he testified that he "never said that the disciplinary process was changing" going forward, and during which he never made any distinction between major and minor offenses. (GC Exh. 2.)

In Luehrmann's Board affidavit in Case 09-CA-52301, he stated that Froslear used the hypothetical about safety glasses "to illustrate his point about the disciplinary procedure," and tell employees that "if a manager saw an employee without safety glasses, the manager would verbally remind the employee to make sure he was wearing his safety glasses. If the man-

ager then saw the same employee committing the same infraction, the manager would give that employee a written warning." Luehrmann testified that it "is the same disciplinary process that has always been in place, Froslear simply wanted to make sure all employees understood it;" he emphasized that "Froslear did not change the disciplinary process or procedure" in those meetings or threaten to do so. (GC Exh. 3; Tr. 102-103). Unlike Froslear, Luehrmann's hearing testimony regarding this matter was consistent with his (Luehrmann's) prior affidavit testimony. Therefore, for purposes of this case, I credit Luehrmann's more consistent, testimony regarding statements made by Froslear at those April employee safety meetings.

## 3. Discipline issued by Respondent

The General Counsel introduced evidence of disciplinary statements issued to Respondent's employees from 2011 through 2016, with various titles: verbal counseling, verbal warning, written counseling, written warning, warning letter and suspension.<sup>16</sup> All of these statements, including verbal counselings and warnings, were documented in writing. It was undisputed that Froslear made no distinction between a "written counseling," "written warning" or "warning letter," and considered them to be "equal." (Tr. 82.)

A review of the history above shows that, more often than not, Respondent handed out discipline a couple of days or more after the incident in question. Therefore, it was not unusual that Rottinghouse received his warning letter 3 days after the cylinder incident. In addition, it reflects that Respondent's practice, irrespective of the CBA, article 22 provision, was to issue documented and undocumented verbal counseling and warnings for certain first time offenses. Respondent issued these types of verbal discipline through September 21, 2015. (GC Exh. 4, pp. 6, 8-10, 13-16, 20.)

The only discipline of record for carrying an unsecured load was a "written counseling" issued to employee Huff on March 10, 2011 for transporting unsecured cargo (on March 8) in the form of a loose cylinder on the floor of the trailer, a pallet of liquid containers secured with only one strap and another unsecured pallet. This was documented as a DOT violation, and he was required to review DOT/Safecor driver requirements for securing cylinders and to ride with the driver trainer. I note that Rottinghouse received a written warning, but was not required to take any remedial action other than to follow the rules. (GC Exh. 4, pp. 1, 19; Jt. Exh. 1.)

Most verbal discipline was documented as a "verbal counseling" or "verbal warning." In 2013, they were issued to: employee Hollander for leaving grease on the steering wheel of a forklift; employee Carlo for not wearing proper leather gloves when filling high pressure cylinders; and employee Jeffries for a preventable backing accident. In 2014, they issued to employee Perkins for not wearing a seatbelt while using a forklift. In 2015, to employees Huff and Kinkade for DOT violations of clocking in 1-3 minutes early<sup>17</sup>, and to employee Oestreicher

<sup>16</sup> See GC Exh. 4, pp. 1-21; GC Exh. 7. Respondent provided these documents in response to the General Counsel's subpoena duces tecum.

<sup>17</sup> DOT regulations require that commercial truck drivers be off duty for 10 consecutive hours prior to clocking in for their next shift.

for talking on the cell phone while operating a tow mower. (GC Exh. 4, pp. 6, 8–9, 13–15, 20; GC Exh. 7.) Another, dated in 2013, and reduced to a verbal counseling from an unrecorded greater discipline, issued to employee Reed for DOT violation of driving while on the phone. This verbal counseling noted that Reed’s conduct could have subjected him to a \$2570 fine and Airgas to an \$11,000 fine. (GC Exh. 4, p. 10). Froslear could not recall whether or not this discipline was reduced through a grievance, but there is no doubt that it was reduced. In addition, an untitled note, not written on the standard Airgas form, reflected a discussion with an employee “Steve” in 2013 for a load verification mistake.<sup>18</sup> (GC Exh. 4, p. 9.) There is also evidence of two unwritten verbal discussions—one with employee Baker on November 14, 2011 for a first offense of not wearing safety glasses, and another with employee Haynes in November 2013 for his first offense of improperly performing the pre-fill inspection process (costing the operation \$2500). (GC Exh. 4, pp. 3, 11).

“Written counseling” statements and “written warnings” were issued as follows: in 2011, to employee Bowman for a backing accident and employee Baker for a repeated incident of not wearing safety glasses; in 2012, a second to Baker for failing to complete and correct his trip load verification and hazardous material manifest—actions that “cause incorrect cylinder balances at our customer, incorrect stock level internally and violates DOT requirements;” in 2013, to employee Hollander for not wearing a seat belt while operating a forklift, noting that this followed a verbal warning for his first offense of leaving grease on a steering wheel (see above); in 2014, to employee Haynes for failing to fill cylinders and perform the proper prefill inspection process “resulting in episodes uncovered recently,” and which cost Airgas \$4500; in 2016, to employee Huff for a preventable backing accident (ran into the side of another company’s building). (GC Exh. 4, pp. 2–4, 7, 11–12, 21). The written warnings to employees Baker and Hollander were the only instances of record where Respondent issued written warnings after first giving some type of verbal discipline for a violation of the same or another rule. (See above; GC Exh. 4, pp. 3, 6–7.)

Of note, Baker received his second written warning within about 6 months of his first, which did not mention the first one. And, within about 5 months of the second warning, he received a 3-day suspension for being caught on the road, during a DOT inspection, without a valid medical certificate. The suspension stated that “[t]his is not the first issue you have had following DOT compliance as an Airgas driver.” (GC Exh. 4, pp. 3–5). The only other suspension was the 3-day suspension given to Rottinghouse on June 26, 2015. (GC Exh. 4, pp. 17–18.)

Froslear testified that Respondent considered more serious or “major” Airgas or DOT violations to include incidents such as backing or motor vehicle accidents, driving with unsecured loads, “going down the road with incorrect paperwork” (failing

to provide complete and correct trip load verification and hazardous material manifest), and driving a vehicle without a valid medical certification.<sup>19</sup> (Tr. 69–94.) He did not, however, consider a first offense to be major when it resulted in Respondent having to spend thousands of dollars in costs. (Tr. 94). I reiterate that he did not share these distinctions with employees during the April employee safety meetings or in his previously discussed Board affidavit.

There appears to have been at least two exceptions to Froslear’s serious incident rule, wherein employees receive warnings rather than verbal discipline for first time major/serious violations. Regarding the first, employee Jeffries only received verbal discipline for his preventable vehicle backing accident on May 10, 2013. (GC Exh. 7.) This particular verbal warning, issued and signed by Luehrmann, was not written on a standard Airgas discipline form. Luehrmann did not recall whether or not he had received Froslear’s approval prior to issuing the discipline, but did recall providing it to him in connection with the General Counsel’s subpoena. Froslear testified that he never knew about this incident prior to the hearing. However, I discredit testimony that he was not familiar with this verbal warning. Other evidence shows that he approved discipline at the Cyn-Day plant. Nevertheless, both he and Luehrmann considered a backing accident to be a serious offense. Next, I find it incredulous, that in employee Reed’s case, Froslear did not consider a commercial truck driver talking on the phone while driving on the road a serious DOT infraction. He obviously believed it to have been at the time, since it was reduced from some form of greater punishment. Moreover, DOT apparently considered it to be a serious or major violation since it levied substantial fines for such offenses on both drivers (\$2570) and their employers (\$11,000) (for Company). (GC Exh. 4, p. 10.)

According to Froslear, other examples of minor Airgas or DOT violations included failing to wear gloves, leaving grease on equipment, not wearing safety glasses, and clocking in a few minutes too early. (Tr. 69–94.)

### III. ANALYSIS

#### A. Preliminary Determinations

##### 1. Evidentiary finding

Rottinghouse testified that during the August 6 meeting, he asked Froslear to go check the 12-pack cradle that had been on his truck to see if it rattled, but that Froslear refused to do so. He claimed that the same cradle had been removed from his truck, at an unspecified time by an unspecified person, between August 3 and 6, and stored at the Cyn-Day plant until August 6. He further testified that after the August 6 meeting, he (Rottinghouse) he took a video recording, with audio, of him shaking the same 12-pack. The General Counsel played this video at the hearing; and, it indeed showed Rottinghouse moving a 12-pack cylinder bank back and forth, causing it to make noise. The General Counsel offered this video to support Rotting-

<sup>18</sup> There was no evidence presented that this “Steve” was the Charging Party. Luehrmann testified that he signed this note, but was not involved in the matter. However, the signature or initials on it appear to be Froslear’s when compared to Froslear’s initials at the bottom of Rottinghouse’s warning letter (Tr. 108; GC Exhs., pp. 4, 19.)

<sup>19</sup> Froslear also considered completing DOT paperwork off the clock to be a severe violation. (See Rottinghouse’s suspension at Jt. Exh. 1 & GC Exh. 4, pp. 17–18.)

house's claim that the noise that Froslear heard on August 12 came from the 12-pack of hydro cylinders, over which Rottinghouse had no control, versus the tilting cylinders. I admitted this recording into the record; however, I give it little if any evidentiary weight. The General Counsel failed to show that it was the same 12-pack cradle, or that if it was, that it had remained in the same condition (i.e., no chain of custody evidence presented). Next, there is no evidence that Rottinghouse's shaking demonstration constituted an accurate simulation of motion and rattling that might have resulted from a sudden stop at the plant's gate. (Tr. 152–161; Jt. Exhs. 1, 7, 9–10.)

## 2. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, *supra* at 622. Indeed, in this case, I have believed witnesses on some points, but not on others. If there is any evidence not recited herein that might seem to impact the credited facts set forth, I have not ignored such evidence, but considered it and determined it is not essential in deciding the issues, or I have rejected or discredited it as not reliable or trustworthy.

Although I credited Rottinghouse's testimony that he made a sudden stop to avoid hitting the gate, I doubt his testimony that the sudden stop caused the cylinders on his truck to tilt over. During the August 6 disciplinary meeting, he never mentioned that he believed that the cylinders on his truck tilted as a result of his sudden braking at the gate. He did not offer this explanation until the September 2 grievance meeting. (Jt. Exhs. 7, 9.) (Jt. Exhs. 7, 9.) I find that if he really believed that his sudden braking caused them to move, he would have told Froslear so at the August 6 meeting. Therefore, I do not credit Rottinghouse's testimony that he knew when or how the cylinders on his truck must have moved. Rather, I find that he speculated about what happened after he received the warning letter.

Next, I find that contrary to testimony by Perkins and Oestreicher (see below), the cylinders were not properly secured. As stated, even Rottinghouse believed that they were not, and accordingly, fixed them before resuming his route. He even acknowledged that he should have been issued a verbal warning rather than none at all.

There is no dispute that the cylinders on Rottinghouse's truck at some point tilted while they were being transported back to the Cyn-Day plant, and that Rottinghouse was responsible for loading and securing them. The dispute is whether or not he properly secured before them leaving the GE site. He believed that he did, and Froslear attributed the tilting cylinders to his failure to do so. Although he did not see Rottinghouse slam on brakes at the gate, Froslear testified that if such a stop

occurred, it would and should not have caused the cylinders to lean over had they been properly fastened in the first place. (Jt. Exh. 9.)

## Testimony of Oestreicher and Perkins

Thus, there was a lot of back and forth among the parties' witnesses about whether or not abrupt braking at the gate or normal driving conditions would or could have caused properly secured cylinders to become loose and lean over.<sup>20</sup> The General Counsel's witness, Oestreicher, testified that based on his 21 years of driver experience, it is quite possible and "in the normal routine" for straps on cylinders to work their way down during transport. However, he also stated that the cylinders as depicted at Joint Exhibit 2 were in fact still secure because "[t]hey're not falling over. They're not criss-crossed. They're not anything but standing upright and secure." He also testified that had he driven into the Cyn-Day plant parking lot with similarly leaning cylinders, he probably would not have retied them: "I mean, if it looks out of place, you would re-secure it. But if the bottle is typically leaning a little bit, nothing." (Tr. 174.) I discredit Oestreicher's testimony. His testimony is not reliable as the cylinders on Rottinghouse's truck were clearly not standing upright or properly tied.

Perkins, also an Airgas driver at the Cyn-Day plant, testified cylinders such as those on Rottinghouse's truck frequently come loose under the following circumstances:

... if you don't have those straps exactly right on those cylinders the vibration, going down the road, or any kind of shift, it holds—anything will drop those straps. Now, the straps are still around and the cylinders are still secure. But there might be sway in the cylinders ... The cylinders look secure. The straps go around. All I can tell you is that these pallets are not designed to hold three or four cylinders. They are designed to hold 14 cylinders, or 10 or eight. But when you start getting three or four cylinders, and it's hard to secure these cylinders.

(Tr. 186–188.) In his opinion, it was "[v]ery common" to have to readjust the straps throughout the day due to normal driving conditions. Like Oestreicher, he did not believe that the cylinders in the photograph appeared to have been in danger of coming completely loose or falling down. Unlike Oestreicher, he admitted that if he had similarly tilted bottles on his truck, he would have straightened and re-strapped them. (Id.) I find that Perkins' testimony was somewhat equivocal in that he admitted that "if you don't have those straps exactly right on those cylinders the vibration, going down the road, or any kind of shift ... anything will drop those straps." In addition, it is clear from Respondent's rules and regulations, that cylinders were to be securely fastened no matter how many or how small they were.

## Testimony of Froslear and MacBride

On the other hand, Froslear and MacBride testified that in the normal course of driving an Airgas truck, it was almost impossible for properly strapped cylinders to shift or tilt. Both testified that the cylinders on Rottinghouse's truck were not

<sup>20</sup> There is no dispute, as stated above, that local drivers were required to check and make any readjustments necessary to their loads at each stop.

properly secured or nested, and at risk of falling. (Tr. 43–47, 195–200, 208–210.) Froslear went to great lengths describing the appropriate nesting technique and how Rottinghouse had not utilized it. (Tr. 43–47.) Froslear also testified that if the cylinders on Rottinghouse’s truck were “tilted over in the first place, they are loose,” and that going down the highway, it was possible for them to break free of the straps. He explained that the “small cylinder could have easily fell out. Notice at the top, that strap is just at the cap level. That cylinder, that’s nothing stopping it at the bottom from slipping down and coming out.” (Tr. 36–37.) With some degree of hesitation, he finally admitted that it was not common, but possible for properly secured cylinders to come loose. (Tr. 43–45.)

MacBride testified that “[e]xcessive slamming on brakes could cause moving of cylinders.” Initially, he defined excessive braking as “[g]oing 40,50 miles an hour and slamming on the brakes to the point you’re almost skidding . . .” He insisted that even then, “[p]roperly strapped cylinders should not move on your truck” under those circumstances. When asked if coming to a sudden stop after accelerating through an open gate from a stopped position would cause properly strapped cylinders to shift, he answered “absolutely not.” When asked if improperly strapped cylinders would shift, he said “yes.” (Tr. 195–200, 208–209.) He further stated that it would be considered a serious out-of-service DOT violation if caught on the road, of which management and the driver would be fined. In his opinion, “moving cylinders are moving cylinders,” no matter whether they are tilted over or freely falling and/or moving inside of a pallet on a truck. The DOT employee would write it up the same way. (Tr. 212.) However, he admitted that it is appropriate to physically inspect cylinders. Moreover, he testified that if he saw a driver with leaning cylinders, he would go find the driver and tell him to fix it. (Tr. 213–214.)

I discredit testimony of Rottinghouse, Perkins, and Oestreicher that properly secured cylinders routinely become loose under normal driving conditions. If this was the case, there would likely have been some evidence of drivers receiving DOT citations or more drivers receiving some type of discipline. Further, I certainly do not believe that Airgas and DOT requirements for drivers to check their loads at each stop only exist because it is common place for appropriately secured loads to become loose. Nor do I find it impossible for properly secured cylinders to become loose under certain conditions. However, I credit MacBride’s testimony that stopping suddenly at the gate under the circumstances set forth by Rottinghouse would not have caused properly secured cylinders to tilt. Rottinghouse entered the gate, stopped to open it and began to move through the gate before having to hit his brakes. Although there was no evidence as to Rottinghouse’s speed after he reopened the gate and entered the plant yard, I find it implausible that it would have been fast enough such that hard braking would have caused appropriately tied cylinders to loosen and lean over. Therefore, I find it more likely than not, that the cylinders on Rottinghouse’s truck were not properly fastened when he left the GE stop.

On the other hand, I discredit Froslear’s testimony that he actually saw the cylinders fall or even tilt when Rottinghouse stopped in the yard. His testimony on this point was equivocal,

hesitant and largely inconsistent with other statements. He initially testified that he saw the cylinders falling when Rottinghouse pulled into the yard, but on further questioning, admitted that they did not fall, but rather tilted. Further, he failed to mention in his emails to MacBride on August 5 that he saw the cylinders on Rottinghouse’s truck move. Instead, he wrote that “[t]his is the way it was when he pulled in after his run.” (Jt. Exh. 3.) Moreover, the warning letter stated that Froslear “was in the parking lot when he heard rattling and saw you pulling into the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise.” When he gave Rottinghouse the warning letter on August 6, he said that he “witnessed SR pulling into the yard, I heard loose cylinders rattling and when SR came to a stop saw them move, fall forward.” (Jt. Exhs. 1, 7.) It is my opinion that more likely than not, as set forth in the warning letter, Froslear did not see that the cylinders were loose and tilted until after Rottinghouse parked in the yard. Thus, I find that he fabricated this part of his story in order to bolster his reasons for issuing the warning letter.

Further, I have discredited Froslear’s testimony that he did not see Rottinghouse when they were both near Rottinghouse’s truck. Froslear claimed that he did not know where Rottinghouse was, but he certainly knew that he was somewhere on the premises. In addition, he knew to watch through a window to see what Rottinghouse would do next after he (Froslear) finished taking the pictures. I do not believe that it was mere coincidence that he happened to be looking out the window when Rottinghouse was re-securing his cylinders. Moreover, I find that Froslear’s actions were incongruent with those of a manager concerned about safety or even about his drivers or Company receiving DOT citations and fines for driving with unsecured loads.

Neither Froslear nor Rottinghouse were entirely honest regarding their versions of events on August 3. However, I find that overall, Froslear was far less credible. I find that Froslear’s inconsistent and unbelievable testimony about discipline, misrepresentation about falling cylinders, dishonesty about not seeing Rottinghouse outside near the truck, failure to physically examine the cylinders on the truck and failure to find Rottinghouse and correct the unsecured cylinders support my finding below that he was not credible regarding his real reasons for issuing Rottinghouse’s warning letter and not agreeing to reduce it to a verbal counseling or warning.

#### B. Legal Standards

Under Section 8(a)(4) of the Act, it is unlawful for an employer to discipline or otherwise discriminate against an employee because he/she has filed charges with the Board, has testified in Board proceedings and/or has provided testimony in Board investigations. *NLRB v. Scrivener*, 405 U.S. 117 (1972).

In cases in which motive is an issue, the Board analyzes 8(a)(4) and (1) violations under the *Wright Line* framework.<sup>21</sup>

<sup>21</sup> *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). See also, *Newcor Bay City Division*, 351 NLRB 1034 fn. 4 (2007); *Verizon*, 350 NLRB 542, 546–

The burden is on the General Counsel to initially establish that Respondent's decision to take an adverse action against an employee was motivated, at least in part, by protected Board participation. In order to meet this burden, the General Counsel must show that the employee engaged in activities protected by the Act; the employer was aware of the activity; and the activity was a motivating factor in the employer's adverse decision. Once the General Counsel has met its initial showing sufficient to support an inference that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to that it would have taken the same action even in the absence of the protected conduct. (*Id.*)

The Board will consider circumstantial as well as direct evidence to infer discriminatory motive or animus, such as: (1) timing or proximity in time between the protected activity and adverse action; (2) delay in implementation of the discipline; (3) departure from established discipline procedures; (3) disparate treatment in implementation of discipline; (4) inappropriate or excessive penalty; and (4) employer's shifting or inconsistent reasons for discipline. *CNN American, Inc.*, 361 NLRB No. 47 (2014) (citing *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Praxair Distribution, Inc.*, 357 NLRB 1048, 1048 fn. 2 (2011)).

#### C. The Initial Burden Was Met

Here, it is undisputed that Rottinghouse engaged in Board activity protected by Section 8(a)(4) of the Act when he filed prior charges with the Board on May 14 and on July 7. There is also no genuine controversy that the Board processed and investigated these charges until they were resolved in September (see above). Although Respondent indicates in its Brief that it was not aware of Rottinghouse providing affidavits in these cases, it is clear from the evidence that the Board conducted investigations in each of them. In the first, both Froslear and Luehrmann provided affidavits, and I seriously doubt that the Board would have decided not to elicit testimony from the Charging Party. As for the latter, it is clear that the Board conducted a thorough investigation, and there is no evidence that the Charging Party and Respondent's management officials did not participate in that investigation. (GC Exhs. 2–3; Jt. Exhs. 6–7.) Therefore, I find that Respondent not only knew that Rottinghouse filed charges under the Act, but also should have known that he participated in Board investigations of those charges. I have also credited testimony that Froslear participated in an August 5 grievance meeting regarding the suspension made the basis of Rottinghouse's July 7 charge.

The only element left for me to determine is whether or not the General Counsel has established a prima facie case of animus. First, I find that the timing of the warning in this case is suspicious, in that it closely followed Rottinghouse's second charge in Case 09–CA–155497 by only 1 month. I dismiss Respondent's argument that timing here is not determinative because Rottinghouse's filed his first charge in Case 09–CA–152301 almost three months prior to issuance of his warning

letter. (R. Br. at 10–11.) The investigation in that case was ongoing as evidenced by the affidavits of Froslear and Luehrmann, signed and sworn before the Board agent on July 13, and as previously discussed, did not close until September. Further, Respondent's reliance on *M&G Convoy*, 287 NLRB 1140, 1144–1145 (1991), on this point is misplaced. In that case, the Board affirmed the judge's determination that there was no "credible evidence" that Respondent took any adverse action based on the charging party's protected activity. That decision was based on factual findings that although the deciding official generally knew about the charging party's protected activity, he was not involved or implicated in any of the incidents "which could fairly give rise to an inference of animus." Here, Froslear was involved, and the implicated official in both of Rottinghouse's charges, as well as the deciding official in connection with his suspension. Further, although the Region dismissed Rottinghouse's most recent charge regarding his 3-day suspension, this did not occur until almost two months after issuance of his letter of warning. Finally, in *M&G Convoy*, supra, the judge placed emphasis on the fact that timing was the primary basis for showing motive. Such was not the case here.

In addition to timing, I find that Froslear's actions on August 3 demonstrate a complete lack of concern for safety, which is in direct contrast to his testimony about the main reason that he issued Rottinghouse a warning letter. Most striking is his failure to locate Rottinghouse and address the conditions of the cylinders on Rottinghouse's truck immediately after he discovered that they were not securely fastened. Froslear's failure to attempt to promptly correct what he described in testimony as an extremely dangerous situation, along with his overall dishonesty discussed above, leads me to doubt his real motive in disciplining Rottinghouse. He and MacBride gave pretty detailed testimony about how improperly secured and/or nested cylinders posed such great risk of danger to the public. They claimed that the improperly loaded cylinders, as they appeared in Joint Exhibit 2, were at risk of falling down and off of Rottinghouse's truck. In fact, MacBride admitted that had he discovered the tilted cylinders, he would have tried to find the driver to correct them. I do not disagree that unsecured cylinders pose a potential risk of harm to the driver and others. However, I take great issue with the fact that Froslear allowed Rottinghouse to get out of his truck and go inside the facility without looking for him, while he was "concentrating" on getting his camera and taking a picture of the cylinders on the truck. (Tr. 39–41.) Next, he took pictures, but did not attempt to physically examine the cylinders to see if they were loose, movable or making noise when moved. Nor did he physically examine them to see how loose they or the straps around them were. Then, he went back inside the plant, and stood idly by, apparently watching to see what Rottinghouse would do next. Froslear also testified that he would not have let a driver return to the road with unsecured cylinders. However, his conduct suggests otherwise. There is no evidence which leads me to believe that, had Rottinghouse not straightened and re-secured the cylinders on his truck, Froslear would have run out to make him do so before he returned to the road.

Although counsel did not ask how Froslear could tell from a window inside the plant that Rottinghouse had properly nested

547 (2007); *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

and secured cylinders, it is implausible that he would have been able to even make that assessment without going out to the truck, and looking at and/or physically examining them. In addition, given that Froslear described in such detail how Rottinghouse had not nested the cylinders, it is surprising that he never mentioned anything about nesting in his emails to MacBride, the warning letter or any of the subsequent meetings with Rottinghouse and the union representatives. He did not even require, in the warning letter, that Rottinghouse review training on securing or loading cylinders.

I have also discredited Froslear's testimony that he did not see Rottinghouse when they were both near Rottinghouse's truck. Overall, in my opinion, Froslear demonstrated that he was out to get Rottinghouse, and therefore more intent on catching and punishing him for reasons other than ensuring public safety or protecting Airgas from liability.

Regarding disparate treatment or departure from established discipline procedures, and contrary to Froslear's testimony, there is evidence that at least two other employees received verbal counselings for more serious DOT violations. I find that this departure, his inconsistent testimony regarding established discipline policy, as well as other factors leading to diminished credibility, create an inference of animus. His testimony regarding what he told employees in the April safety meetings was inconsistent with his Board affidavit testimony and with that of Luehrmann. He testified that he was establishing new discipline policy going forward, but the record shows that Respondent issued verbal counseling to employee Edger Reed in November 2013 for talking on the phone while driving—an infraction for which Reed and Respondent could have been subjected to large fines. I discredited Froslear's testimony that this was not a serious DOT violation, and found it alarming that he would not have considered a commercial truck driver driving along the highways while talking on the phone a serious DOT violation. It is certainly as potentially dangerous as a truck driving with slightly leaning cylinders, and both are DOT violations. Therefore, I find that Respondent departed from its stated policy for issuing written and verbal warnings. In addition, employee Jeffries received a verbal warning for a major preventable backing accident.

In that vein, Respondent denies disparate treatment on its part since it treated Rottinghouse and Huff the same in issuance of discipline. Huff received a written counseling and Rottinghouse a written warning, both deemed to be equal in magnitude. Froslear testified that the leaning cylinders on Rottinghouse's truck were just as dangerous as those on employee Huff's truck in 2011, in that they were at risk of coming completely loose and falling. As stated, Huff's cylinders included one fallen on its side, another pallet of liquid filled bottles with only one strap and another unsecured pallet. (GC Exh. 4, p. 1.) It is clear to me that the cylinders on Huff's truck posed a much greater risk of danger than those on Rottinghouse's truck. In fact, Respondent must have believed that to be the case since it mandated Huff to review DOT/Safecor and driver requirements for securing cylinders with his supervisor and ride with the driver trainer. In contrast, as mentioned earlier, Respondent only directed Rottinghouse to "take personal responsibility for creating and maintaining a safe environment," to properly se-

cure cylinders and follow other DOT/safety procedures.

I do not believe Froslear's testimony that he issued the warning letter as a form of progressive discipline. It was not a stated reason in the warning letter nor was it mentioned during the September 2 discipline meeting. In fact, Froslear's suspension was not noted at all. Instead, the first time that Froslear brought up Rottinghouse's first offense was during the second grievance meeting on September 23, and then only in response to Butts' claim that Rottinghouse believed he should have received a verbal warning since it was his first offense. If this was a sincere basis for issuing the discipline, I find that it would have been included in the warning letter and confirmed during the August 6 discipline meeting. Moreover, during the September 2 grievance meeting when Perkins told Froslear that Rottinghouse's warning should have been a verbal pursuant to CBA Article 22, Froslear responded that the contract necessitated a written warning notice for an employee's violation. This was not only inconsistent with other evidence that Respondent did not follow article 22 to the letter, but it was also contrary to Respondent's reducing employee Reed's discipline to a verbal counseling and Respondent's other reasons for issuing the warning letter—progressive discipline and the severity of the infraction. There is no doubt from the evidence presented, that Respondent had an established practice of issuing both verbal and written warnings, in writing and undocumented for various types of rule violations.

Finally, Froslear's out to get you attitude towards Rottinghouse is also supported by his email to MacBride, insistence that MacBride find the "strongest language" about securing cylinders and failure to conduct a meaningful investigation, as well as his made up story about seeing falling cylinders.

I have considered all of the arguments and case law offered by the General Counsel<sup>22</sup> and Respondent, even that not specifically mentioned in this decision. Regarding Respondent's arguments regarding the omission of settlement agreement and pre-settlement conduct connected with his charge/Case 09-CA-152301, I find they are misplaced here. (R. Br. at 11-15.) The cases cited do not involve similar circumstances as in this case, and there is no need to engage in a detailed discussion of them. Moreover, the prior charge and pre-settlement conduct was only used in this case as evidence in connection with protected activity and credibility.<sup>23</sup> The Board has held that settlement agreements do not preclude consideration of pre-settlement statements or conduct as evidence shedding light on a respondent's subsequent discipline of a charging party. See *Kaumagraph Corp.*, 316 NLRB 793, 794 (1995) (evidence of presettlement conduct admissible as background for respondent's motivation).

Therefore, based on the evidence as a whole, I conclude that the General Counsel has met its initial burden of persuasion

<sup>22</sup> I dismiss the General Counsel's argument that the 3-day delay in issuing Rottinghouse's warning letter inferred animus, as I previously found that it was not unusual for Respondent to issue discipline several days after an offense occurred.

<sup>23</sup> As evidenced in this decision, I have dismissed Respondent's argument that Froslear's hearing and Board affidavit testimony in Case 09-CA-152301 was consistent; rather, it was anything but and raised suspicion about Froslear's motivation in this case. (R. Br. at 11-15.)

under *Wright Line* of showing through sufficient circumstantial evidence that Respondent's motivation for the written warning was motivated by his disdain for Rottinghouse's repeated charge filings with the Board.

*D. Respondent Failed To Meet Its Burden of Showing That It Would Have Disciplined Rottinghouse In The Absence of His Protected Activity*

First, I find that such shifting and inconsistent rationales, and incredibility, as set forth above support a finding that Froslear's reasons for disciplining Rottinghouse are pretextual. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014) (shifting reasons for an employer's adverse actions are not only persuasive evidence of discriminatory motive, but also serve as evidence of pretext); *Approved Electric Corp.*, 356 NLRB 238 (2010) (citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.")).

Moreover, my findings thus far regarding the factors leading to animus also undermine the Respondent's ability to rebut the General Counsel's prima facie case of unlawful discipline. Accordingly, I conclude that under a *Wright Line* analysis, the Respondent violated Section 8(a)(4) and (1) by issuing Rottinghouse a letter of warning.

#### CONCLUSIONS OF LAW

1. Respondent, Airgas USA, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By issuing Charging Party, Steven Wayne Rottinghouse, Jr., a written warning on August 6, 2015, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(4) and (1) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent shall make Rottinghouse whole by expunging from its files any reference to the unlawful letter of warning dated August 5, 2015, and issued to him on August 6, 2015.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>24</sup>

#### ORDER

The Respondent, Airgas USA, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>24</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Issuing discipline to employees, or otherwise discriminating against them, for giving affidavits, filing charges or otherwise participating in the National Labor Relations Board process.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful letter of warning, and within 3 days thereafter notify him in writing that this has been done and that the letter of warning will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to its employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 2015, the date of the letter of warning.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. July 7, 2016

#### APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

<sup>25</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline employees or otherwise discriminate against them because they have provided an affidavit, filed a charge or otherwise participated in the National Labor Relations Board process.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right under Section 7 of the Act, as set forth at the top of this notice.

WE WILL, within 14 days from the date of this Order, rescind and remove from our files any and all references to the letter of warning dated August 5, 2015 and issued on August 6, 2015, to Steven Rottinghouse, Jr. and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the letter of warning will not be used against him in any way.

AIRGAS USA, LLC

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/09-CA-158662](http://www.nlrb.gov/case/09-CA-158662) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, DC 20570, or by calling (202) 273-1940.

